Laborers Local No. 113, a/w Laborers International Union of North America *and* Michels Pipeline Construction, Inc. and International Union of Operating Engineers Local 139, AFL–CIO. Case 30–CD–161

October 31, 2002

DECISION AND DETERMINATION OF DISPUTE

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act (the Act). The charge in this proceeding was filed on September 18, 2000, by the Employer, alleging that the Respondent, Laborers Local No. 113 a/w the Laborers International Union of North America (Laborers Local 113), violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer not to reassign certain work from employees it represents, who were performing the work, to employees represented by International Union of Operating Engineers, Local No. 139, AFL–CIO (Operating Engineers Local 139). The hearing was held on October 17 and 18, 2000, before Hearing Officer Angela B. Jaenke.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Employer, a Wisconsin corporation, is an underground utility contractor headquartered in Brownsville, Wisconsin. During the 12 months preceding the hearing, it purchased and received goods, materials, and services valued in excess of $50,000 directly from suppliers located outside the State of Wisconsin. The parties stipulate, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Laborers Local 113 and Operating Engineers Local 139 are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of Dispute

The Employer, as a member of the Wisconsin Underground Contractors Association (WUCA), is signatory to collective-bargaining agreements with both Unions: the Sewer, Tunnel and Water Laborers' Collective Bargaining Agreement between WUCA and the Wisconsin Laborers' District Council, representing Laborers Local 113; and the Sewer, Water & Tunnel Master Agreement Area I between WUCA and Operating Engineers Local 139. Both agreements are effective through May 31, 2003.

Early in 2000,[1] the Employer was engaged in the construction of a sewer project, referred to as the North Shore 6 Project, for the Milwaukee Metropolitan Sewerage District. The project requires excavating three vertical shafts. These shafts are located: (1) on a private easement which extends from Newhall Avenue known as the WP structure; (2) a site 60 feet north and east of the WP shaft, referred to as the 097A structure; and (3) at the intersection of Newhall and Park, referred to as the 136A structure. Excavation is done by both large surface backhoes and small underground backhoes (mini-excavators or mini-backhoes).[2]

Vertical shaft excavation begins with a large surface backhoe being used to dig a hole into the ground. Operating Engineers-represented employees perform this initial excavation. The surface backhoe can dig approximately 16 feet below the surface. As the hole is dug, external bracing must be erected to secure the sides of the shaft. Laborers-represented employees install the bracing. When the surface backhoe reaches its limit, an Operating Engineers-represented employee uses a crane to lower a bucket or "clam" into the shaft to remove loosened soil and muck from the bottom. While the debris is being removed, Laborers-represented employees stationed inside the shaft shore up the shaft walls. In situations where a clam cannot be used or where the ground is too hard, a mini-backhoe may be used instead to further scoop out and remove the soil. The smaller mini-backhoe is lowered by crane into the bottom of the shaft, the operator excavates the area from below the surface, and the shaft walls continue to be shored up. The Employer assigned the work of operating the mini-backhoes underground to employees represented by Laborers Local 113.

In late May, the Employer received a letter postmarked May 26, but dated March 24, from Operating Engineers Local 139 Business Representative Pete Wade stating that Local 139 was filing a formal grievance against the Employer. The accompanying grievance, also dated March 24, complained that bargaining unit employee Brian Meyer was not being paid the proper wages and fringe benefits for operating a backhoe in the shaft at the Newhall and Bradford jobsite. The grievance requested the Employer to pay the employee all applicable back wages and benefits and to provide Operating Engineers Local 139 with all payroll records and/or timecards from the time the job began. The grievance also stated "[n]othing contained within this grievance is intended

[1] Dates refer to the year 2000 unless specified otherwise.

[2] The mini-backhoe is a diesel-powered tracked machine weighing between 5000 and 15,000 pounds, having a hydraulic arm excavator with a bucket at the end of the arm. An operator uses hand and foot controls to run the equipment. Except for its smaller size, there is essentially no difference between a mini-backhoe and a large, surface backhoe.

nor should be interpreted to be a request to change the assignment of the backhoe."

The Employer responded by letter of June 6. The Employer stated that the alleged aggrieved employee, Meyer, was classified as a miner, a Laborers' classification, and is a member of the Laborers' International Union of North America. The Employer stated further that the work Meyer was performing, i.e., "backhoe operation in a shaft," had long been established as Laborers' union work[3] and that the Employer was paying Meyer the contract wage scale and benefits prescribed by its agreement with Laborers Local 113. The Employer stated that any suggestion that the underground backhoe work was covered by Operating Engineers Local 139's contract was wrong. Thus, the Employer asserted that there was no basis for the grievance.

WUCA Executive Director Richard Wanta testified that in late August Operating Engineers Local 139 Business Manager Dale Miller told him that his union would strike for 6 weeks in order to gain jurisdiction of the underground backhoe operation. About a month later, Miller reiterated the threat, but extended the time the Union would be willing to strike to 3 months. In addition, Greg Rehak, an employee of another employer, Super Excavators, testified that during a Labor Day gathering, Operating Engineers Local 139 Vice President Terrance E. McGowan, referred to a similar, ongoing controversy with Rehak's employer over mini-backhoe work, saying, "we'll see who runs out of money first, the Operators or Super Excavators."

In pursuit of its grievance, on August 23, Operating Engineers Local 139 made a written request to the Federal Mediation and Conciliation Service for a panel of arbitrators.

Upon learning of Local 139's intention to seek arbitration, on August 30, Laborers Local 113 Business Manager Charles Fecteau advised the Employer that if it changed the assignment from the Laborers to Operating Engineers Local 139, "Local 113 will have no other choice but to use every means at our disposal, including striking, to protect the Laborers' jurisdiction." The Employer did not alter the work assignment, but filed the instant unfair labor practice charge against Laborers Local 113 alleging a violation of Section 8(b)(4)(D).

[3] The Employer cited decades of historical precedent in assigning underground backhoe work to the Laborers. In addition, the Employer referenced a 1998 Board decision and determination of a jurisdictional dispute involving the same type of work and another Milwaukee-area employer, Super Excavators, Inc., and the Laborers Local 113 and Operating Engineers Local 139, in which the employees represented by the Laborers were awarded the work. *Laborers Local 113 (Super Excavators, Inc.)*, 327 NLRB 113. The Employer also pointed to a December 1998 arbitrator's decision, in which the arbitrator found no merit to an operating engineer's grievance against Super Excavators over the same work assignment.

B. Work in Dispute

The work in dispute is the operation of mini-backhoes (mini-excavators) in underground shafts and tunnels at the North Shore 6 Project for the Milwaukee (Wisconsin) Metropolitan Sewerage District.

C. Contentions of the Parties

Operating Engineers Local 139 filed a motion to quash the notice of hearing. It contends that there is no 10(k) dispute because it has made no claim for the underground backhoe work. The language of the grievance itself states that it is not to be construed as a claim for the underground backhoe work.

Local 139 maintains that its grievance does not ask that the work be reassigned, but rather that the appropriate contract wage and benefit rates be paid to the individual running the mini-backhoe, irrespective of whether that individual is represented by the Operating Engineers or the Laborers.[4] Local 139 cites language from its collective-bargaining agreement designating a compensation rate for operators of "backhoes (excavators) under 130,000 pounds" in support of its position. It states that it always files a grievance upon learning that a contractor is paying subcontract wages and fringe benefits and that it wants to protect against the erosion of the prevailing wage for employees covered in the backhoe operator classification.

Local 139 also asserts that Laborers Local 113's reaction to Local 139's grievance was a sham designed solely to invoke the Board's statutory jurisdictional dispute process and should not be given credence. The purported threat to engage in a strike in order to preserve the mini-backhoe work mischaracterizes the nature of the grievance, which seeks only higher compensation for the mini-backhoe operator. There is no evidence that Local 113 has ever struck an employer over this issue and Local 139 argues that it is not likely that Laborers Local 113 would be willing to risk its harmonious relations with the Employer by disrupting the work.

Finally, Local 139 contends that even assuming there is a work dispute, both Unions have a dispute resolution mechanism available to them through their International Unions and that the Employer would abide by the decision made through that vehicle.[5]

[4] Operating Engineers Local 139 acknowledges that its grievance is similar to the one it filed against Super Excavators, Inc. over its payment of Laborers Local 113's rates to the mini-backhoe operator. That matter resulted in a May 2000 unfair labor practice charge in Case 30–CD–160, issued this day at 338 NLRB No. 50, and herein referred to as *Super Excavators II*. Because of the similarity of issues in these cases, the entire record of proceedings in that case, as well as that of *Super Excavators I*, supra, was entered into the record in the instant proceeding.

[5] This contention is contrary to Operating Engineers Local 139's stipulation at the hearing that there is no agreed-upon dispute resolution process.

The Employer asserts that a jurisdictional dispute does exist, citing Laborers Local 113's stipulation to that effect and the text of Operating Engineers Local 139's grievance. The Employer contends that despite Local 139's claims to the contrary, its assertion that its contract terms should be applied to the operator of the underground mini-backhoe is tantamount to a claim for the work. Local 139's grievance erroneously describes the aggrieved employee as a "Bargaining-unit employee" and argues that its contract language covers the job. Further, the Employer maintains that the language of the grievance itself clearly demonstrates that Local 139 is arguing that the operation of the underground backhoes falls under the terms of its collective-bargaining agreement.

Moreover, the Employer argues that Local 139's position that it is not claiming the work is belied by contrary statements from its own representatives. As described above, Business Manager Miller twice threatened to strike over the work and Vice President McGowan referred to Local 139's ongoing dispute with another employer involving the same type of work. Both of these statements,[6] the Employer asserts, suggest that the Operating Engineers Local 139 intended to pursue the work at whatever cost.[7]

In addition, the Employer argues that Operating Engineers Local 139's prevailing wage contention is not credible, given that its grievance seeks to have its own contract rate of $24.79 per hour given effect, rather than the established prevailing hourly rate of $22.41. Finally, citing Operating Engineers Local 139's record of grievances and prior jurisdictional disputes over the same issue and the strong likelihood that the matter will arise again, the Employer requests a broad order awarding the work to the Laborers.

Laborers Local 113 argues that Operating Engineers Local 139's purported disclaimers are disingenuous and that its grievance reveals a coercive attempt to obtain the work for its members. Operating Engineers Local 139's request that the Employer pay its contractual wage rates to the individual performing the backhoe work underground is clearly a claim for the work under its collective-bargaining agreement. Moreover, Laborers Local 113 states that its collective-bargaining agreement with the Employer gives its unit members the right to perform the work. Finally, Laborers Local 113 has informed the Employer of its intent to keep the work and reiterated that it will use all means necessary to enforce its right to it, including striking.

Both the Employer and Laborers Local 113 contend that an award in favor of employees represented by Laborers Local 133 is justified by that Union's collective-bargaining agreement, employer preference and past practice, area and industry practice, relative skills and training, and economy and efficiency of operations. They further point out that prior a Board decision[8] involving an employer in the same industry, the same two unions, the same work, and in the same geographic area favors an award to Laborers Local 113.

Following the close of the hearing, the Employer moved, and Laborers Local 113 joined in the motion, to reopen and supplement the record. Operating Engineers Local 139 opposed their motion.[9]

D. Applicability of the Statute

Before the Board may proceed with a determination of a dispute under Section 10(k) of the Act, it must be satisfied that (1) there are competing claims for the work; (2) there is reasonable cause to believe that Section 8(b)(4)(D) has been violated; and (3) the parties have not agreed on a method for the voluntary adjustment of the dispute.

Initially, we find that there are extant competing claims for the work. Laborers Local 113 has at all times claimed the work in dispute; Operating Engineers Local 139 has, despite assertions to the contrary, also claimed the work. We find that Operating Engineers' Local 139's grievance, coupled with testimony regarding its representatives' interpretation of its contract with the Employer, establish that it was claiming the underground mini-backhoe work for its unit members.

We are not persuaded by Operating Engineers Local 139's characterization of its grievance as seeking enforcement of standards rather than reassignment of the work. By declaring that an objective of its grievance is the application of contractually prescribed wage and benefit rates to the underground backhoe work, Operating Engineers Local 139 is taking the position that the work is covered by its contract and is, therefore, asserting jurisdiction over it.[10] Any ambiguity regarding Op-

[6] Because neither Miller nor McGowan was called to testify, Wanta's and Rehak's accounts stand uncontradicted.

[7] In its brief, the Employer also cites statements made following the close of the hearing by Business Manager Miller which appear in the November 2000 Operating Engineers Local 139 Wisconsin News.

[8] *Super Excavators I.*

[9] The Employer and the Laborers seek to have admitted into the record the November 2000 issue of the Operating Engineers Local 139 Wisconsin News, an official publication of that labor organization. The Employer and Laborers contend that a column written by Local 139 Business Manager Dale Miller contains statements that support their contention that the Operating Engineers is claiming the work at issue in this proceeding. We deny the motion as the existing record is sufficient to decide the issue before us.

[10] By filing the grievance, Local 139 is necessarily claiming that the work performed by the mini-backhoe operator is covered by its collective-bargaining agreement. In its posthearing brief, Local 139 admits that the grievance effectively asserts that Local 139 is "the sole and exclusive [bargaining] agent for Michel's mini-backhoe operators." Thus, Local 139's grievance literally seeks to have the disputed work assigned to employees that it represents. Our finding that Local 139 claims the disputed work is consistent with the Board's decisions in *Laborers Local 113 (Super Excavators, Inc.) (Super Excavators I)*, 327 NLRB 113 (1998); and in *Laborers Local 113 (Super Excavators, Inc.) (Super Excavators II)*, 338 NLRB No. 50 (2002), issued this day, in which the Board found that Local 139 claimed the same disputed work.

erating Engineers' actual objective is erased by subsequent statements by Local 139 Representatives Miller and McGowan, in which they declare a firm commitment to go to great lengths to secure the backhoe work. In the face of such unequivocal statements, Local 139's claim for the work is clear.

Finally, the Employer, Laborers Local 113 and Operating Engineers Local 139 stipulated during the hearing that there is no agreed-upon method for the voluntary adjustment of the work in dispute. While Operating Engineers Local 139 has since changed its position[11] and asserts in its posthearing brief that a dispute resolution mechanism is available, neither the Employer nor Laborers Local 113 acknowledges the existence of such mechanism. Thus, we find that the parties have not all agreed to be bound by any system.

We find that Laborers Local 113 Business Manager Fecteau's letter of August 30 constitutes a threat of economic action by his union if the work were reassigned to Operating Engineers Local 139-represented employees. There is no evidence that these statements were a sham.[12] Therefore, reasonable cause exists to believe that a violation of Section 8(b)(4)(D) has occurred within the meaning of Section 10(k) of the Act.

In view of the circumstances described above, and absent an agreed-upon method for the voluntary adjustment of the dispute, we find that the matter is properly before the Board for determination. Thus, we find no merit in the Operating Engineers Local 139's argument that the notice of hearing should be quashed.

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.

1. Certification and collective-bargaining agreements

There is no evidence that either Union has been certified to represent employees performing the disputed work. Both Unions assert, however, that their respective collective-bargaining agreements entitle them to the work.

Article 1 of the Laborers Local 113 contract covers "all public works construction including construction, excavation, installation . . . of sewer and water mains . . . tunnels, shafts, and appurtenances and related work." Article 21 defines the Laborers' jurisdiction of public works as including "construction, excavation, installation . . . of sewer and water mains . . . shafts, tunnels . . . and related work." In addition, the classification "backhoe operator" was included in the wage rate addendum of the Laborers' agreement effective June 1, 2000.[13]

Article VI of the Operating Engineers Local 139 collective-bargaining agreement sets forth the Union's jurisdiction and lists the equipment covered by the agreement. There is no reference to backhoes in that section. In article X, however, the wage rate section, the class 1 rate is assigned to operators of backhoes over 130,000 pounds and the class 2 rate is assigned to those running backhoes less than 130,000 pounds.

Based on the above, we find that both contracts provide an arguable basis for covering the work in dispute. Accordingly, we find the factor of collective-bargaining agreements does not clearly favor an award to either group of employees.

2. Employer preference and assignment

The Employer prefers to assign, and has assigned, all below-grade work to employees represented by Laborers Local 113.[14] The Employer cites the Laborers' familiarity with and experience in the shoring-up procedures that are performed at the same time as the mini-backhoe excavation process and points to its long and successful history of assigning the work to Laborers Local 113-represented employees.

Accordingly, we find that the factor of the Employer's preference and assignment favors an award of the disputed work to employees represented by Laborers Local 113.

3. Area and industry practice

While the Employer maintains that it has assigned Laborers Local 113-represented employees exclusively to underground backhoe work for 20 years, there is testimony that on two or three occasions in the late 1980's, and once in 1995, that Operators Local 139-represented employees performed underground backhoe work. The record discloses, largely through anecdotal accounts, that Operating Engineers Local 139-represented employees have occasionally performed this work for area employers. As evidenced through written letters of assignment, however, many employers in the Milwaukee metropoli-

[11] After Local 139 entered into the stipulation that no voluntary dispute resolution mechanism exists, the hearing officer rejected its belated attempt to introduce evidence that such mechanism was, in fact, available. In its posthearing brief, Local 139 reasserts that, assuming a jurisdictional dispute exists, there is a voluntary means through which it can be resolved.

[12] See *Teamsters Local 6 (Anheuser-Busch)*, 270 NLRB 219, 220 (1984).

[13] This change was made following the Board's decision in *Super Excavators I*.

[14] Michel's vice president, Weltin, stated that Laborers Local 113-represented employees have been performing all below-grade work since the first project with the Company in 1980 or 1981.

tan area assign the work to Laborers Local 113. From April 1998 through June 2000, 100 percent of the underground backhoe operations have been assigned to Laborers Local 113.

We conclude from the foregoing that the factor of the Employers' past practice and area and industry practice favors awarding the work to Laborers Local 113-represented employees.

4. Relative skills, training, and safety

Operating Engineers Local 139 points to its training facility in Coloma, Wisconsin, where individuals are taught to operate backhoes ranging from 10,000 to 130,000 pounds. A new course has recently been added entitled "Advanced Excavator," in which skills necessary for tunnel projects are stressed. In addition, trainees must complete safety and maintenance courses before operating any equipment.

Laborers Local 113 point to its long experience record of having safely performed underground mini-backhoe work while at the same time accomplishing the closely related functions of buttressing the shaft (rigging and lagging the sides) to shore up the sides as work progresses as evidence of their superior skill.

The Employer acknowledges that both groups have comparable skill levels at operating the mini-backhoe underground, but notes that the Laborers-represented employees possess additional critical skills necessary for the safe and efficient excavation process. Laborers are adept at handling related tools and equipment needed in the shoring operation which must take place in coordination and almost simultaneous with the mini-backhoe operation. Because of space limitations when working in these shafts, this extra versatility is important if not essential. It enables a Laborers-represented underground backhoe operator to assist in performing these related duties safely and correctly with less risk of accident or injury.

Accordingly, we find that while Operating Engineers Local 139 provides formalized training for backhoe operations, and employees represented by Operating Engineers Local 139 and Laborers Local 113 are equally skilled at running the mini-backhoe itself, safety considerations warrant awarding the underground work to employees represented by Laborers Local 113.

5. Economy and efficiency of operations

As noted above, employees represented by Operating Engineers Local 139 lack the expertise possessed by employees represented by Laborers Local 113 in performing the attendant shoring functions that occur alongside the mini-backhoe work. The Laborers Local 113-represented employees' additional expertise in this area allows them to perform a dual-purpose while working in the shaft. This versatility provides obvious savings in terms of man-hour costs and significantly enhances efficiency of operations. Having fewer employees accomplishing the same task with less risk of accidents or injuries reduces costs in time, money, and personal safety. Accordingly, we find that the efficiency and economy of operation would be enhanced by awarding the work in dispute to employees represented by the Laborers.

Conclusions

After considering all the relevant factors, we conclude that employees represented by Laborers Local No. 113, affiliated with Laborers International Union of North America are entitled to perform the work in dispute. We reach this conclusion relying on factors of employer preference, assignment, and past practice, area practice, safety, and efficiency and economy of operations.

In making this determination, we are awarding the work to employees represented by Laborers Local 113, not to that Union or its members.

Scope of the Award

The Employer requests that the Board issue a broad award, covering the entire Laborers Local 113 region, including Milwaukee, Ozaukee and Washington Counties in Wisconsin, in order to thwart future disputes at jobsites where the equipment at issue is used. The Employer cites the behavior of both Laborers Local 113 and Operating Engineers Local 139, as evidenced by the repeated appearances before the Board in jurisdictional disputes, in support of its request.[15] The Employer argues that Operating Engineers Local 139 has demonstrated its proclivity to file grievances over the assignment of the work to non-Operating Engineers-represented employees and that Laborers Local 113 has promised to take any job action required—including strikes—to counter those grievances. Thus, both Unions appear poised to continue the controversy.[16] In addition, the Employer states that the volume of this type of work is likely to increase over the next few years, in light of planned projects being undertaken by the Milwaukee Metropolitan Sewerage District, thereby enhancing the likelihood and frequency of similar disputes arising again.

While the pattern of conduct by both Unions suggests that a similar dispute may arise again, it is the Board's practice to decline to grant an areawide award in cases in which the charged party represents the employees to whom the work is awarded and to whom the Employer intends to continue to assign the work.[17] Accordingly, in these circumstances, we find a broad award is not war-

[15] The Employer refers to *Super Excavators I* and *II*, supra, which preceded this case.

[16] The Employer argues that while Laborers Local 113 is the party charged with engaging in proscribed conduct a broad award to employees it represents should not be precluded inasmuch as it was the Operating Engineers Local 139's grievance which initiated the dispute and precipitated the threat.

[17] *Laborers (Paul H. Schwendener, Inc.)*, 304 NLRB 623 (1991), *Laborers Local 1359 (Krall's Masonry)*, 281 NLRB 1034 (1986).

ranted. The determination is therefore limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following determination of dispute.

Employees of Michels Pipeline Construction, Inc., represented by Laborers Local 113, a/w Laborers International Union of North America, are entitled to perform the operation of the mini-excavator/backhoe in the underground shafts and tunnels at the North Shore 6 Project for the Milwaukee Metropolitan Sewerage District.

Dated, Washington, D.C. October 31, 2002

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William B. Cowen, Member

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Michael J. Bartlett, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, concurring.

I agree that the evidence in this case is sufficient to support a finding that Operating Engineers Local 139 has claimed the underground backhoe work. The case is distinguishable, in my view, from *Super Excavators, Inc. (Super Excavators II)*, 338 NLRB 50 (2002), also issued this day, where I dissented from the majority's conclusion that Local 139 had made a claim to the backhoe work. While the terms of the grievance filed against the Employer here parallel the grievances at issue in *Super Excavators II*, the stated intent of the grievance here is inconsistent with Miller's and McGowan's uncontroverted statements indicating an objective beyond merely upholding Local 139's contractual standards. Given this extrinsic evidence, I would find reasonable cause to believe that Local 139 has made a claim for the work in this case.

Dated, Washington, D.C. October 31, 2002

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Wilma B. Liebman, Member

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